NO. 81195-4

SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 58831-1)

CASCADE ORTHOPAEDICS, a partnership,

Appellant/Respondent,

vs.

JOSIE ARMANTROUT and WARREN ARMANTROUT, husband and wife and the marital community composed thereof,

Respondents/Petitioners.

PETITIONERS' SUPPLEMENTAL BRIEF

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INTRODUCTION

This case is an appeal from a jury verdict in which the jury found petitioners Josie and Todd Armantrout dependent for support upon their daughter, Kristen, who died as the result of the medical negligence of Cascade Orthopaedics. The trial court allowed the jury to consider services that Kristen provided to her parents in making their determination whether the Armantrouts were dependent upon their daughter. Cascade appealed, and the Court of Appeals reversed the jury verdict, holding that as a matter of law only the payment of money can be considered by the trier of fact in determining whether a parent was dependent for support within the meaning of RCW 4.20.020.

The petitioners respectfully request that this Court reverse the Court of Appeals decision and hold that a trier of fact may include services in determining whether a parent is dependent for support on an adult child. The Court should hold that RCW 4.20.020 should be construed liberally to include services that have economic value.

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The Court of Appeals erred when it held with respect to RCW 4.20.020 that the court may "only liberally construe these remedial statutes

once the proper beneficiaries have been determined." (Op. at 10.)[1]

2. The Court of Appeals erred when it held that the statutory language of RCW 4.20.020, "dependent for support" cannot, as a matter of law, include services provided by an adult child to her parents.

3. The Court of Appeals erred when it held that services cannot be considered by the trier of fact in determining "financial dependence."

B. Issues Pertaining to Assignments of Error

1. Should RCW 4.20.020 be construed liberally when determining whether parents are dependent upon their adult child for support considering the long line of Washington cases that hold statutes that are remedial in character be construed liberally?

2. Can a parent be dependent for support upon an adult child who provides services that have an economic value?

3. Can the provision of services be financial support within the meaning of RCW 4.20.020?

II. STATEMENT OF THE CASE

The substantive and procedural facts of this case are stated in Petitioner's Petition for Review and incorporated herein.

[1] For the convenience of the Court, petitioners have attached the Court of Appeals' published opinion and refer to it as "Op. at p. ___."

III. ARGUMENT

A. The Court of Appeals Erred When It Held That RCW 4.20.020 Must Be Construed Narrowly In This Circumstance

The Court of Appeals held that RCW 4.20.020 can be construed liberally only after the proper beneficiaries have been determined. However, this Court has repeatedly acknowledged the remedial purpose of the wrongful death statute and that it is to be liberally construed.

In *Cook v. Rafferty,* this Court stated that the wrongful death statutes are remedial in nature and "are liberally construed." [2] The Court has reiterated that this is the correct rule of statutory construction in *Klossner v. San Juan County, Johnson v. Ottomeier,* and *Gray v. Goodson.*[3]

Not only has this Court repeatedly held that liberal construction is the correct rule, the Court has also rejected the narrow rule of construction for RCW 4.20.020. The Court in *Bortle v. Northern Pac. R. Co.* stated that:

> [W]hile we would not give it such a strict construction as to say it means wholly dependent, or that the parent must have no means of support or livelihood other than the deceased, ***such a construction being too harsh and not in accordance with the humane purpose of the act.*** Nevertheless, there must be some degree of dependency,

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[2] *Cook v. Rafferty*, 200 Wash. 234, 240, 93 P.2d 376 (1939).

[3] *Klossner v. San Juan County*, 93 Wn.2d 42, 49, 605 P.2d 330 (1980); *Gray v. Goodson*, 61 Wn.2d 319, 324, 378 P.2d 413 (1963); *Johnson v. Ottomeier*, 45 Wn.2d 419, 423, 275 P.2d 723 (1954).

> some substantial dependency, a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child.[4] [Emphasis added.]

The Court has also stated that:

> Also, we must not lose sight of the fact that the statute upon which the right of action is based is remedial in character. It creates a right of action not existing at common law, and ***should not, in its application, be so limited by construction as to partially defeat its purpose.***[5] [Emphasis added.]

In *Armijo v. Wesselius,*[6] the Court extended the literal scope of the statute to protect beneficiaries clearly contemplated by the statute by extending the definition of "child or children" under RCW 4.20.020 to include illegitimate children. The Court reasoned that:

> "[M]any of the decisions in the past [construing wrongful death statutes], and a few of the later ones as well, have crippled the operation of this legislation by employing a narrow construction on the basis that these statutes are in derogation of the common law. ***However, it may now safely be asserted that the better and modern authorities are in agreement that the objectives and spirit of this legislation should not be thwarted by a technical application.***"[7] [Emphasis added].

Similarly, in *Wilson v. Lund,*[8] this Court extended RCW 4.24.010 to allow divorced mothers to initiate an action for the injury or death of a

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[4] *Bortle v. Northern Pac. R. Co.*, 60 Wash. 552, 554, 111 P. 788 (1910).
[5] *Mitchell v. Rice,* 183 Wash. 402, 407, 48 P.2d 949 (1935).
[6] *Armijo v. Wesselius*, 73 Wn.2d 716, 440 P.2d 471 (1968).
[7] *Id.* at 720.
[8] *Wilson v. Lund*, 74 Wn.2d 945, 447 P.2d 718 (1968).

minor child, when the statute allowed a cause of action for the mother only when the father had died or deserted the family or if her child was illegitimate. In its opinion, the Court emphasized the purpose of the act:

> The courts, in pursuance of the general object of giving effect to the intention of the legislature, are not controlled by the literal meaning of the language of the statute, but the spirit or intention of the law prevails over the letter thereof.
>
> . . . .
>
> It is a rule of such universal application as to need no citation of sustaining authority that no construction should be given to a statute which leads to gross injustice or absurdity.[9]

This Court should reject the narrow rule of construction in this case and hold that RCW 4.20.020 should be construed liberally because it is remedial in nature. Liberal construction in this case would mean that the statutory language, "dependent for support" include all means of support with an economic value.

The importance of determining the correct rule of statutory construction for RCW 4.20.020 was also discussed in the Washington State Trial Lawyers Association Foundation Amicus Curiae Memorandum in Support of Review filed in this matter. The petitioners ask the Court to refer to this memorandum in support of the petition.

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[9] *Id.* at 947.

B. The Court of Appeals erred when it held that the statutory language of RCW 4.20.020, "dependent for support" cannot as a matter of law include services provided by an adult child to her parents

This Court should reverse the Court of Appeals' ruling in this case, because the Court of Appeals ignored the actual language of the statute when it held that services cannot be "financial support." The Court of Appeals looked to the dictionary definition for the word "financial" for its holding that financial support can only mean the payment of money. However, RCW 4.20.020 does not include the words "financial support." The statute states that: "[i]f there be no wife or husband or such child or children, such action may be maintained for the benefit of the parents, sisters or brothers, who may be ***dependent upon the deceased person for support*** . . ." [10] (Emphasis added.)

Washington courts have long held that, when construing a statute, meaning must be given to all words contained in the statute.[11] In addition, courts may not read words into the statute that are not there.[12] In the present case, the Court of Appeals has interpreted the court-imposed term "financial dependence" to the exclusion of the actual statutory language, "dependent for support." Although Washington courts have interpreted the statutory language to mean "financial," this case is a case of first

[10] RCW 4.20.020.
[11] *Dennis v. Labor & Indus.*, 109 Wn.2d 467, 479, 745 P.2d 1295 (1987).
[12] *Vannoy v. Pacific Power & Light Co.*, 59 Wn.2d 623, 629, 369 P.2d 848 (1962).

impression, and the provision of services has not been excluded, until now, from the definition of "dependent for support." In fact, Washington courts have twice considered services in determining whether or not parents were dependent upon their adult children for support.

First, this Court explicitly considered the adult daughter's ***care*** of her parents, as well as her monetary contributions, when it affirmed the trial court's award of $1,000 to her parents in their wrongful death suit in *Cook v. Rafferty*.[13] The evidence in that case indicated that the daughter lived with her parents and contributed to the household expenses. Her father was an invalid, and her mother was unemployed. The Court stated that:

> Under the facts, we think it is reasonable to suppose that had Miss Cook lived she would have continued to contribute to the support of the family and ***continued to care for her parents***, and to conclude that Mr. and Mrs. Cook suffered a pecuniary loss by reason of her death.[14] [Emphasis added.]

The Court in *Cook* explicitly considered the ***care*** the daughter was providing her parents, one of whom was disabled like Josie Armantrout. Based upon the contributions and the care, this Court concluded that the

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[13] *Cook v. Rafferty*, 200 Wash. 234, 93 P.2d 376 (1939).
[14] *Id.* at 240.

Cooks had suffered a pecuniary loss. The Court also referred to the remedial purpose of the wrongful death statute in making its decision.[15]

Second, the Court of Appeals considered an adult son's services to his parents in making a determination of dependent for support in *Masunaga v. Gapasin*.[16] There, the parents testified that their son provided accounting services for them and prepared their tax returns. The Court of Appeals determined that the Masunagas were not dependent upon their son for support, not because their son provided services and not money, but because the Masunagas did not show that they were ***dependent*** upon such services.[17] The Armantrouts testified at length how they were dependent upon Kristen's services.

In the present case, the Court of Appeals focused on the word "financial" and its definition to narrow the interpretation of support to the payment of money. However, the definition of the term actually used in the statute – support – includes services that allow one to live:

> **Support**, *n.* That which furnishes a livelihood; a source or means of living; subsistence, sustenance, or living. In a broad sense the term includes all such means of living as would enable one to live in the degree of comfort suitable and becoming to his station of life. It is said to include anything requisite to housing, feeding, clothing, health, proper recreation, vacation, traveling expense, or other proper cognate purposes; also proper care, nursing, and

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[15] *Id.*
[16] *Masunaga v. Gapasin*, 57 Wn. App. 624, 790 P.2d 171 (1990).
[17] *Id.*

> medical attendance in sickness, and suitable burial at death.[18]

The trial court recognized, and the jury confirmed, that Kristen's services that she provided to her mother allowed her mother a means of living in her own home and with some degree of freedom and spontaneity, in addition to proper care, nursing, medical attendance in sickness. Certainly, Kristen provided her mother the kind of support described in the definition. The record shows that Kristen saved her mother's life. On one occasion, Kristen found her mother when her glucose was so low she would not wake up. Kristen was able to take Josie's glucose reading, give her the Glucagon kit, and wait to see whether she needed to call 911. RP 7/18 at 66-68.

The exclusion, as a matter of law, of anything but the payment of money in determining financial dependence would produce unjust and harsh results. A bright-line rule excluding the provision of services, as a matter of law, would affect elderly and developmentally, or otherwise, disabled people who may be living with an adult child, brother or sister and dependent upon them for support in the way of shelter and services. A bright-line rule would serve only to exclude the neediest and most vulnerable people from suing for wrongful death, if they are "second-tier"

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[18] *Black's Law Dictionary*, 1291 (5th ed. 1979).

beneficiaries and no "first-tier" beneficiaries existed. A bright-line rule fails to recognize that families often lack financial resources in the form of money to aid a family member, but they may have the time and skills to offer services that may otherwise have to be paid for.

This is true in the present case, where the evidence showed that Josie had to move from her home as soon as possible after Kristen died. Moreover, Josie had to impose upon her sisters, one of whom had to fly up from California, to live with her until her husband could move her to Bemidji. They, then, abandoned their house in Auburn. Once in Bemidji, Josie became a prisoner in her own home. True, she did not want for food or shelter, but she could not even seek needed medical attention on her own. Her husband and son were working and not available much of the day. Her medical appointments often had to be cancelled because there was no one to take her.

This Court should give meaning to the words of the statute as written and hold that services provided by an adult child to the parent can be considered when determining whether the parent was dependent for support.

C. The Court of Appeals erred when it held that services cannot be considered by the trier of fact in determining "financial dependence."

The Court of Appeals erred when it held that "financial

dependence" cannot include services as a matter of law. This Court should extend the judicial interpretation of "financial dependence" to include services that allow the parent, brother or sister to live.

This Court has previously extended the literal scope of the statutes to protect beneficiaries clearly contemplated by the statute.[19] In *Armijo v. Wesselius,* the Court extended the definition of "child or children" under RCW 4.20.020 to include illegitimate children based in part on "common sense humanity."[20] The Court reasoned that:

> Whether done liberally or strictly, judicial interpretation is necessary even under respondents' rule; illegitimate children are ***not necessarily excluded*** under the terms of RCW 4.20.020. This being so, we must still engage in a process of weighing and balancing competing values, and it appears to us that social policy considerations favoring inclusion of illegitimate children as beneficiaries should be given effect.[21] [Emphasis added].

In *Wilson*, the Court extended RCW 4.24.010 to allow divorced mothers to initiate an action for injury or death of a minor child based on the following: "'A statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat such manifest object, it should receive

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[19] *Masunaga*, 57 Wn.App. at 631.
[20] *Armijo*, 73 Wn.2d at 719.
[21] *Id.* at 720.

the former construction.' 2 Sutherland, Statutory Construction § 4704 (3d ed. Horack)."[22]

The language of the statute allows "parents, sisters or brothers, ***who may be dependent upon the deceased person for support***" to maintain an action for wrongful death.[23] (Emphasis added.) Although Washington courts have interpreted "dependent for support" to mean financial support, and not emotional support, the term "financial" ***does not necessarily exclude*** services which have financial value.

That Kristen's services provided to her mother had substantial financial value was established by the testimony of Lowell Bassett, Ph.D., plaintiffs' economist. He testified that Kristen provided over 183 hours per month of services for her mother. Using the going rate for household services in Bemidji, Minnesota, Dr. Bassett testified that the value of Kristen's services to her mother was $36,553 per year or $107,101 to the date of trial. RP 7/18 at 19-20.

Other states consider the provision of services when determining whether a parent is financially dependent upon a child.[24] The Fifth Circuit Court of Appeals, in a Georgia case, *Hogan v. Williams,* considered

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[22] *Wilson*, 74 Wn.2d at 948.
[23] RCW 4.20.020.
[24] *Hogan v. Williams,* 193 F.2d 220, 224 (5th Cir. 1951); *Chavez v. Carpenter*, 91 Cal. App. 4th 1433, 1445, 111 Cal. Rptr. 2d 534, 544 (2001); *Deaconess Hosp. v. Gruber*, 791 N.E.2d 841, 847 (Ind. App. 2003); *Hines v. Hines*, 32 Or. App. 209, 214, 573 P.2d 1260 (1978).

services in determining dependency. In Georgia, a statute allowed a parent to recover for death of a child on whom the parent is dependent, or who contributes to the parent's support.[25] The Court stated:

> [S]ervices of a child to a mother or of a mother to a child may well be reckoned as contributing substantially to the support of the recipient far beyond any money value which the services may have, and the chief element of dependence may be in respect to personal services of that nature.[26]

The facts in the *Hogan* case are remarkably similar to the facts in the present case. In *Hogan,* the deceased child provided no money to her mother, but instead, provided services to enable the mother to go to New York for better employment. Similarly, in the present case, Kristen Armantrout's services enabled her father to go to Bemidji for his new job.

A California case, *Chavez v. Carpenter*, was relied upon by the trial court in the present case.[27] In California, the Code of Civil Procedure allows parents to sue for the wrongful death of their adult child "if they were dependent on the decedent."[28] California courts also interpret "dependent" to mean financial dependence.[29] The *Chavez* court ruled that:

> [I]f a parent receives financial support from their child which aids them in obtaining the things, such as shelter, clothing, food and medical treatment, which one cannot and should not do without, the parent is dependent upon their

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[25] *Hogan*, 193 F.2d at 223.
[26] *Id.* at 224 (quoting *Scott v. Torrance*, 25 S.E.2d 120, 126 (1943)).
[27] *Chavez v. Carpenter*, 91 Cal. App. 4th 1433 (2001).
[28] Code Civ. Proc., § 377.60.
[29] *Chavez*, 91 Cal.App. 4th at 1445.

> child. The death of that child in this type of situation results in a distinct pecuniary loss to the parent which requires the parent to find aid elsewhere for the basic things we all need. [30]

In *Chavez*, the Court found that the parents were at least partially dependent upon their adult child. The Court held that:

> It appears from this record that appellants received "financial support from their child which aid[ed] them in obtaining . . . shelter, clothing, food . . . ." There is evidence that appellants routinely relied on decedent for money to defray their ordinary living expenses, and for help with their cars, land, and business. The reasonable inference from that evidence is that appellants relied on decedent's aid – at least to some extent – for life's necessities. That inference is not overcome by defendant's assertion that appellants had sufficient income to pay their mortgage and other bills without decedent's assistance.[31]

Washington appellate courts have previously relied upon California cases in construing the wrongful death statute and the term "dependent for support."[32]

These cases from other states recognize the reality that services have substantial monetary value, and without them, a parent may be required to find aid elsewhere for the basic things she needs. The Court of Appeals refused to extend the meaning of "financial" to include services, even though it noted how similar the California law is to Washington law. (See Op. at p. 14.) The Court of Appeals merely concluded that the

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[30] *Id.* at 1446.
[31] *Id.*, at 1447-1448.
[32] *Masunaga*, 57 Wn.App. at 628.

analysis in *Chavez* conflicts with "Washington's long history of requiring 'financial' dependence." However, this reasoning is faulty, given that Washington courts have never been asked to rule on this issue.

It was apparent even to the Court of Appeals that the Armantrouts were dependent upon their daughter for support. Even as the Court denied that Kristen's services could be considered support, the Court stated with respect to the jury instructions:[33]

> "As we discussed previously in this opinion, substantial evidence supports the determination that the daughter gave financial support to her parents by way of approximately $588 each mother. ***There is also evidence in the record that her mother depended upon her services for support.***
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> . . . .
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> Josie would have had to pay someone else to do these activities if Kristen had not, and ***Josie could not afford to do so.***
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> . . . .
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> . . .[T]he inclusion of the clause 'services, or other material benefits' in the instruction makes a decidedly ***more persuasive case for dependence*** than if that clause had been excluded."

(See Op. at p. 16.)

It was apparent, even to the Court of Appeals, that Josie and Todd Armantrout were dependent on their daughter for support both from her

[33] For the convenience of the Court, petitioners have attached the trial court's Jury Instruction No. 14 and incorporate the same herein.

monetary contributions and her contributions of services. However, rather than construing the statute as written by the legislature – "dependent for support" – the Court of Appeals narrowly construes the judicial language imposed upon it. Instead of analyzing the meaning of the words actually contained in the statute, the Court of Appeals goes to the dictionary definition of "financial," a ***word not even appearing in the statute***, for support for its narrow holding.

This Court should construe RCW 4.20.020 with reference to its manifest object – to provide a cause of action for the wrongful death of an adult child, or brother or sister, upon whom the surviving person was dependent for support. This Court should affirm the trial court's decision, because the respondents submitted substantial evidence that the Armantrouts were financially dependent upon their daughter.

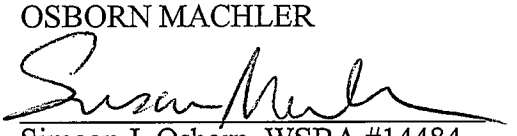
IV. CONCLUSION

Josie and Todd Armantrout respectfully request that this Court reverse the Court of Appeals and hold that services may be considered in determining whether a parent is dependent upon her adult child for support. The Court should hold that the statute is to be liberally construed in accordance to the remedial purpose of the statute and to avoid harsh and unjust results. The Court should hold that "dependent for support" includes services provided to a parent. By so holding, this Court would

recognize that people provide for the support of their families by whatever means they have available, whether it is with cash, sharing their home, or providing services that the other cannot afford. This Court should take this opportunity to recognize the economic reality that people do not always have large sums of cash, and yet, they still find ways care for their families.

Respectfully submitted this 31st day of October, 2008.

OSBORN MACHLER



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ATTACHMENTS

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOSIE ARMANTROUT, personal representative of the estate of KRISTEN ARMANTROUT; JOSIE ARMANTROUT and WARREN ARMANTROUT, husband and wife, and the marital community composed thereof, Respondents, v. ROBERT CARLSON, M.D. and JANE DOE CARLSON, husband and wife, and the marital community composed thereof; and CASCADE ORTHOPAEDICS, a partnership; and/or JOHN DOES 1-100, partners therein, Appellants.	)	No. 58831-1-I DIVISION ONE PUBLISHED FILED: November 13, 2007

COX, J. — At issue is whether services by an adult child to a parent are properly considered in determining whether that parent is "dependent . . . for support" for purposes of that parent qualifying as a beneficiary under the wrongful death statute. Because the provision of services in this case is not financial dependence under the statute and case law, we reverse.

Eighteen-year-old Kristen Armantrout died from a pulmonary embolism that occurred two weeks after minor ankle surgery. At the time of her death, she

was a single adult with no children.

Her parents, Josie and Warren Todd Armantrout, as personal representatives of Kristen's estate, sued Cascade Orthopaedics and her attending physician. They also sought to recover under the wrongful death statute on their own behalf as beneficiaries under the provisions of RCW 4.20.020.

At trial, Cascade objected to the wrongful death claim as well as to the testimony relating to the Armantrouts' dependence on Kristen. Cascade also moved for what the trial court characterized as a motion for judgment as a matter of law on that claim, which the trial court denied. Cascade excepted to the jury instructions concerning the Armantrouts' wrongful death claim and substantial financial dependence as well as to the special verdict form.

The jury found Cascade negligent and awarded the Armantrouts $1,150,000.00 in damages. The jury also awarded Kristen's estate $200,000, which is not at issue in this appeal. The attending doctor was found not negligent and therefore does not appeal the verdict.

Cascade appeals.

DEPENDENT FOR SUPPORT

Cascade argues that the Armantrouts have no standing as beneficiaries under RCW 4.20.020 to bring a wrongful death action. We agree. The services Kristen provided her parents cannot be considered in assessing whether they were "dependent . . . for support" on her.

Civil Rule 50

A motion for judgment as a matter of law should be granted to dismiss a claim if the evidence presented is insufficient to convince a reasonable jury of the issue.[1] An appellate court reviews a trial court's denial of such a motion only to determine whether substantial evidence supported the claim.[2] Substantial evidence is evidence sufficient to convince a fair-minded person of the truth of the matter.[3] We review all facts and inferences in favor of the non-moving party.[4]

The legislature created a two-tiered system of beneficiaries in Washington's wrongful death statute.[5] The first tier consists of the decedent's spouse and children, who have automatic standing to bring a wrongful death claim under the statute.[6] The second tier of the statute includes the decedent's

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[1] CR 50(a)(1).

[2] Queen City Farms, Inc. v. Cent. Nat'l Ins. Co., 126 Wn.2d 50, 98, 882 P.2d 703 (1994), dissenting opinion amended by 891 P.2d 718 (1995).

[3] Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179-80, 116 P.3d 381 (2005).

[4] Queen City Farms, 126 Wn.2d at 98.

[5] RCW 4.20.020; Philippides v. Bernard, 151 Wn.2d 376, 385, 88 P.3d 939 (2004).

[6] RCW 4.20.020; Philippides, 151 Wn.2d at 385.

parents. If a decedent has no spouse or child, a parent may bring a wrongful death claim under the second tier only if the parent is "***dependent upon the deceased for support . . . .***"[7]

The parties agree that since the early 1900s, Washington courts have uniformly interpreted this phrase to mean ***substantial financial dependence***.[8] A parent need not be wholly dependent on the deceased; partial but significant dependence will suffice.[9] But there must be "a necessitous want on the part of the parent, and a [financial] recognition of that necessity on the part of the child."[10] Dependence should be judged based on the current condition, not anticipated future conditions.[11] Emotional support, or providing the types of emotional services one expects from a family member, is outside the scope of the statute.[12]

Cascade argues that the entire question whether the Armantrouts were dependent on Kristen is an issue of law. To the contrary, our supreme court has previously allowed the question to go to the jury if substantial evidence supports

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[7] RCW 4.20.020 (emphasis added).

[8] E.g., Bortle v. N. Pac. Ry. Co., 60 Wash. 552, 554, 111 P. 788 (1910); Masunaga v. Gapasin, 57 Wn. App. 624, 628, 790 P.2d 171 (1990).

[9] Grant v. Libby, McNeill & Libby, 145 Wash. 31, 38, 258 P. 842 (1927).

[10] Bortle, 60 Wash. at 554; see also id. at 556 (paraphrasing the earlier stated rule and adding the word "financial").

[11] Masunaga, 57 Wn. App. at 629.

[12] Id. at 628.

a finding of dependence.[13]

Cascade challenges generally the three jury instructions relating to the Armantrouts' wrongful death claim, arguing that there is insufficient evidence as a matter of law to support that the Armantrouts were dependent on Kristen for support. We conclude that substantial evidence supported the instructions generally.

There is substantial evidence in the record that the Armantrouts depended on Kristen for approximately $588 per month. Josie and Todd both testified that Kristen gave them her disability benefits check each month to help with family expenses. They also testified that at least one reason Kristen relinquished her check each month was to help cover her own living expenses. Despite this fact, Josie and Todd testified that they relied on this money each month to pay family bills, and they would have had to borrow money if Kristen had not given it to them. Thus, substantial evidence supports that the Armantrouts financially depended on Kristen's monetary contribution to the family.

Cascade also argues that the Armantrouts did not truly need this money for support because they created their own hardships by attempting to maintain two different households at the same time. We disagree.

Financial dependence need not be complete dependence, and it is based

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[13] See Mitchell v. Rice, 183 Wash. 402, 48 P.2d 949 (1935) (issue of dependency properly reserved for the jury when there was substantial evidence that the father depended on monetary payments from the deceased).

on the current, not the anticipated future, situation.[14] Mr. Armantrout had lost his job, and the family felt that the proper decision was for his wife and daughter to stay behind to prepare the house for sale while he obtained another job elsewhere. We will not second-guess that decision. The evidence supports the finding, and the jury was properly allowed to determine the significance of the family's decision.

Cascade argues that as a matter of law, a check Kristen received for being dependent upon her mother cannot form the basis for her mother's dependence on Kristen. But Cascade does not identify any legal authority for its argument, and we have found none. The jury was allowed to consider the source and amount of the money and was properly permitted to determine whether it contributed to the Armantrouts being financially dependent on their daughter.

Thus, a jury could reasonably find that the Armantrouts were dependent on Kristen for support within the meaning of the statute and case law based solely on the payments of approximately $588 per month. But whether a jury actually would is not presently before us and should more properly be addressed after remand for the reasons we explain later in this opinion.

In any event, there was substantial evidence in the record that the Armantrouts were financially dependent on Kristen. The trial court properly denied Cascade's CR 50 motion.

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[14] Masunaga, 57 Wn. App. at 628-29.

Judicial Estoppel

Similarly, Cascade argues that the doctrine of judicial estoppel should prevent consideration of the monthly check as financial support, given that the Armantrouts claimed Kristen as a dependent for purposes of social security, tax, and insurance benefits. We disagree because Cascade fails to make out a case for applying judicial estoppel.

The doctrine of judicial estoppel is designed to prevent a party from benefiting by taking inconsistent positions in different litigation proceedings.[15] A court may consider the following six non-exclusive factors in applying this doctrine:

> (1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change.[16]

Here, there was neither a prior judgment nor any prior litigation from which the Armantrouts benefited from claiming Kristen as a dependent. Cascade was never a party to any prior proceeding involving the Armantrouts. And Cascade cannot show how it was misled into changing its position in response to the Armantrouts' position.

Further, the positions that the Armantrouts take are not "clearly

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[15] Johnson v. Si-Cor, Inc., 107 Wn. App. 902, 909, 28 P.3d 832 (2001).

[16] DeAtley v. Barnett, 127 Wn. App. 478, 483, 112 P.3d 540 (2005), review denied, 156 Wn.2d 1021 (2006), cert. denied, 127 S. Ct. 123 (2006).

inconsistent." Cascade has not shown how the definitions of the word "dependent" in the federal tax code, the federal Social Security Act, the Armantrouts' insurance policy, or Washington's wrongful death statute are identical. These definitions exist in different statutes and in different contexts, requiring different proof.

For example, the relevant provision of the Social Security Act allowed Kristen to receive a benefit check as a dependent until she was 19 years old if she still attended school full time.[17] The statute states that a biological or adopted child is "deemed" dependent on his or her disabled parent unless the parent "was not living with ***or*** contributing to the support of such child . . . ."[18]

"Dependent" in the tax code means a child who, among other things, "has not provided over one-half of [his or her] own support" during that year.[19] It does not, as Cascade represents, state the reverse — that the parents have necessarily paid for more than half of the child's support.

We conclude that the reliance by the Armantrouts on these varying definitions is not "clearly inconsistent" with the position that they take in this case.

Jury Instructions

Cascade assigns error to the jury instruction defining financial

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[17] 42 U.S.C. § 402(d)(1).

[18] 42 U.S.C. § 401(d)(3) (emphasis added).

[19] 26 U.S.C. § 152(c)(1)(D).

dependence. It implicitly argues that the jury instruction erroneously allowed the jury to consider services in addition to financial support.[20] Cascade also argues that the jury should not have been allowed to hear testimony related to services. We agree.

Jury instructions are proper if they adequately state the law, do not mislead the jury, and allow each party to argue its theory of the case.[21] A party is entitled to a jury instruction only if it has offered substantial evidence to support the instruction.[22] We review a trial court's decision to submit jury instructions for an abuse of discretion.[23] We review de novo alleged legal errors in the instructions.[24]

An erroneous jury instruction only requires reversal if it is prejudicial.[25] Thus, instructions that are "merely misleading" only require reversal if they more likely than not affected the outcome of the trial.[26] But a "clear misstatement" of the law is presumed prejudicial, unless it affirmatively appears that it was

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[20] See State v. Olson, 126 Wn.2d 315, 318-19, 893 P.2d 629 (1995) (citing RAP 1.2(a) and concluding that cases should be decided on their merits despite technical violations of the rules).

[21] Boeing Co. v. Key, 101 Wn. App. 629, 633, 5 P.3d 16 (2000).

[22] Stiley v. Block, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

[23] Id.

[24] State v. Porter, 150 Wn.2d 732, 735, 82 P.3d 234 (2004).

[25] Boeing Co., 101 Wn. App. at 633.

[26] Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

harmless.[27]

The construction of a statute is an issue of law that we review de novo.[28] Our primary goal is to ascertain the legislature's intent.[29] If the language of the statute is clear, its plain meaning will reveal that intent.[30] If, however, the provision is ambiguous, the reviewing court may look to outside sources such as legislative history to determine legislative intent.[31] A statute is ambiguous if it is subject to more than one reasonable interpretation.[32]

Wrongful death actions in Washington are strictly statutory.[33] We only liberally construe these remedial statutes once the proper beneficiaries have been determined.[34]

Here, jury instruction 14, discussing financial dependence, stated in pertinent part:

> The support may include ***money, services, or other material benefits***, but may not include everyday services a child would

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[27] Blaney v. Int'l Assoc. of Machinists & Aerospace Workers, 151 Wn.2d 203, 211, 87 P.3d 757 (2004).

[28] Burns v. City of Seattle, 164 P.3d 475 (Wash. 2007).

[29] State v. Sullivan, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001).

[30] See id.

[31] Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

[32] Id.

[33] Tait v. Wahl, 97 Wn. App. 765, 771, 987 P.2d 127 (1999).

[34] Id. at 770.

routinely provide her parents.[35]

The trial court here gave this instruction based upon its interpretation of Washington's wrongful death statute, RCW 4.20.020.

The primary issue in this case is whether "[financial] support" under the wrongful death statute includes the rendering of services that have an economic value as well as the payment of money. We conclude that services that have an economic value do not fall within the meaning of financial support.

Since the early 1900s, Washington courts have uniformly interpreted "dependent . . . for support" to mean ***financial dependence***.[36] The word "financial" means "relating to finance . . . ."[37] The word "finance" means:

> **1** . . . **:** the pecuniary affairs or resources of a state, company, or individual . . . **2:** the obtaining of funds or capital . . . **3:** the system that includes the circulation of money, the granting of credit, the making of investments, and the provision of banking facilities. . . . [38]

It is apparent from the words used in these definitions (e.g., "money," "pecuniary," and "funds or capital") that "financial" means "monetary."

The Armantrouts cite no Washington case to the contrary. In discussing the requisite financial support, Washington cases have never suggested that

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[35] Clerk's Papers at 92 (emphasis added).

[36] E.g., Bortle, 60 Wash. at 554.

[37] Webster's Third New Int'l Dictionary 851 (1993).

[38] Id.

financial support could include the types of services the Armantrouts received from their daughter.

For example, in Bortle v. Northern Pacific Railway Co., the supreme court held that the parents were not financially dependent for support upon their 25-year-old son, who did not live at home but intermittently contributed small gifts of money to his parents, for a total of about $100 per year.[39] And in Mitchell v. Rice, substantial evidence supported that the father was financially dependent on his son for monetary payments throughout the years.[40] Likewise, in Cook v. Rafferty, financial dependence was established based on the "pecuniary loss" the parents suffered at the death of their daughter, who did not pay rent but "contributed to the expenses of the household."[41]

Moreover, the more recent Washington cases cited by the parties do not support the Armantrouts' position. Masunaga v. Gapasin merely reaffirmed that financial support, not emotional support, is required under the statute.[42] The parents in that case conceded that they were not financially dependent on their deceased son, and they unsuccessfully argued that emotional dependence should also qualify.[43]

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[39] 60 Wash. 552, 111 P. 788 (1910).

[40] 183 Wash. 402, 48 P.2d 949 (1935).

[41] 200 Wash. 234, 239-40, 93 P.2d 376 (1939).

[42] 57 Wn. App. 624, 790 P.2d 171 (1990).

[43] Id. at 627-28.

Although the court in that case briefly discussed the provision of services and concluded that the parents were not dependent on those services, it did not state that such dependence would have constituted financial support.

Financial independence was also conceded in Schumacher v. Williams.[44] So that case does not help define the term.

More recently, in Philippides v. Bernard, the supreme court clarified that certain amendments to the statute did not change the requirement that parents must be financially dependent on the deceased in order to maintain a wrongful death cause of action.[45] In fact, in rejecting the parents' arguments to the contrary, the court stated:

> While we may agree that the value parents place on children in our society is no longer associated with the child's ability ***to provide income*** to the parents, the legislature has defined who can sue for the wrongful death and injury of a child and we cannot alter the legislative directive.[46]

This sentence suggests that the longstanding test of "financial" dependence or support is limited to the providing of income or money, not services with an economic value. While such a rule may not still be justified in present-day society, that is the rule the legislature has left in place, as our courts have consistently held. We also note that the legislature has had the opportunity to modify this standard, but has chosen to leave in place the existing statute and its

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[44] 107 Wn. App. 793, 796, 28 P.3d 792 (2001).

[45] 151 Wn.2d 376, 88 P.3d 939 (2004).

[46] Id. at 390 (emphasis added).

interpretive decisions.[47]

The trial court appears to have relied on out-of-state cases to support its conclusion that financial dependence may include services. For example, in Chavez v. Carpenter, the California state court of appeal held that a factual issue existed as to whether the parents were financially dependent on the decedent when the decedent provided to his parents $100 a week, groceries, grocery money, a $9,000 down payment on a car, and completed tasks such as yard work and automobile maintenance.[48]

Contrary to Cascade's argument, the statute in Chavez is quite similar to Washington's. Likewise, it has similarly been interpreted by the California courts to mean financially dependent for support.[49] But the similarities end there.

We are not persuaded by the reasoning in Chavez because it does not explain why a jury should be allowed to consider services in addition to financial contributions. It also is unclear to what extent the court relied on services for its holding. The court merely concluded that the reasonable inference from all of the evidence taken together is that the parents relied on the decedent's "aid — at least to some extent — for life's necessities."[50]

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[47] See Masunaga, 57 Wn. App. at 629.

[48] 91 Cal. App. 4th 1433, 111 Cal. Rptr. 2d 534 (2001).

[49] See id. at 1445 (noting that "dependent on the decedent" in the statute has been interpreted to mean dependent for "financial support"). Thus, as in Washington, to qualify under the statute, a surviving parent must be substantially, financially dependent on the decedent for support.

[50] Id. at 1448.

More importantly, we reject the reasoning of Chavez because it directly conflicts with Washington's long history of requiring "financial" dependence.

The Armantrouts argue that the services their daughter provided had an economic value. But neither the statute nor the Washington cases construing it include services that have an economic value within the scope of substantial ***financial*** support. Rather, the cases have consistently focused on the financial nature of the support provided by the adult child to the parent. Despite policy considerations to the contrary, we cannot alter the legislature's determination of beneficiaries under the statute.[51]

Here, the jury instruction[52] misstated the law because, as discussed above, conferring services and other benefits does not constitute financial support. Thus, the trial court committed an error of law.

Although the parties did not address the issue, we must also determine whether this error was prejudicial. We conclude that the instruction is presumed prejudicial because it misstated the law.[53]

Even were we not to presume prejudice, the instruction caused actual

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[51] See Schumacher, 107 Wn. App. at 805 (Ellington, J., concurring) (declining to exercise the legislative function of extending the law to non-dependent survivors "despite strong policy considerations" to do so).

[52] Jury Instruction 14 states in relevant part, "The support may include money, services, or other material benefits, but may not include everyday services a child would routinely provide her parents." Clerk's Papers at 92.

[53] See Keller, 146 Wn.2d at 251 (". . . to the extent that the instruction misstated the law, it is presumed to be prejudicial.").

prejudice. As discussed previously in this opinion, substantial evidence supports the determination that the daughter gave financial support to her parents by way of approximately $588 each month. There is also evidence in the record that her mother depended on her services for support. Josie, the mother, testified that Kristen helped prepare the house for sale, which included doing housework, packing, and yard work. Kristen also acted as Josie's personal assistant, helping her with things a blind person cannot do alone. For example, Kristen ran errands, paid the bills, drove Josie to appointments and other places, helped Josie take notes in class and do other school-related reading, and medically assisted her. Josie would have had to pay someone else to do these activities if Kristen had not, and Josie could not afford to do so. In fact, the expert economist testified that the services Kristen provided for Josie had a value of approximately $36,553 per year.

Comparing the amount of the purely monetary contribution with the value of services, it is apparent that the erroneous jury instruction and supporting testimony likely affected the jury's verdict that the Armantrouts were substantially dependent on Kristen. Kristen gave her parents about $588 per month, which would total about $7,056 per year. In contrast, the value of her services was $36,553 per year. Based on a comparison of these two values, the inclusion of the clause "services, or other material benefits" in the instruction makes a decidedly more persuasive case for dependence than if that clause had been excluded. We conclude that the erroneous instruction prejudiced the outcome of

the trial.

We reverse the judgment and remand for a new trial.

Cox, J.

WE CONCUR:

Appelwick, C.J.

Grosse, J.

INSTRUCTION NO. 14

The plaintiff has the burden of proving that Kristen Armantrout's mother and father were substantially financially dependent upon her for support. Substantial financial dependence requires a showing of a need or necessity for support on the part of the parents and an agreement by Kristin to provide such support. In determining whether Josie and Todd Armantrout were substantially financially dependent on Kristen, you should consider the extent of Kristen's financial contributions to her parents and whether or not such support was likely to continue for a period of time. The support may include money, services, or other material benefits, but may not include everyday services a child would routinely provide her parents. You may not consider emotional support Kristin may have provided her parents.

Substantial financial dependence may be partial, but must be based on current financial contributions, not the promise of future contributions or services.